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COMMENT

RACIAL MINORITY HOUSING IN WASHINGTON

ARVAL A. MORRIS* AND DANIEL B. RITTER**

*O'Meara v. Washington State Bd. Against Discrimination*¹ called upon the Washington Supreme Court to pass for the first time on the constitutionality of Washington's Anti-Discrimination Statute. The court invalidated the portion applicable to housing. This comment discusses the social and legal contexts in which the case was decided, the disposition of the case at the trial and appellate levels, and the merit of some alternative measures for preventing discrimination in housing.

THE SOCIAL CONTEXT

Racial discrimination in housing is the most crucial civil rights problem in the North today.² First of all, the building trades seem not to have significantly expanded new housing starts,³ making fewer new homes available to an ever more rapidly expanding population.⁴ Further complicating this problem is another consideration—housing discrimination against minority groups generally, and against Negroes

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¹ *O'Meara v. Washington State Board Against Discrimination*, 58 Wn.2d 793, 365 P.2d 1 (1961).

² See Robison, *Housing—The Northern Civil Rights Frontier*, 13 W. RES. L. REV. 101 (1961). The authors are much indebted to Mr. Robison for his excellent recent summary of racial housing problems. See generally, WEAVER, *THE NEGRO GHETTO* (1948); ABRAMS, *FORBIDDEN NEIGHBORS* (1955); McENTIRE, *RESIDENCE AND RACE* (1960); LAURENTI, *PROPERTY VALUES AND RACE* (1960); COMM'N ON RACE AND HOUSING, *WHERE SHALL WE LIVE?* (1958). "Residential segregation... is relatively more important in the North than in the South, since laws and etiquette to isolate whites from Negroes are prevalent in the South but practically absent from the North, and therefore institutional segregation in the North often has only residential segregation to rest upon." MYRDAL, *AN AMERICAN DILEMMA* 618 (1944). See also Edmunds, *The Myrdalian Thesis*, 15 PHYLON 297 (1954); Medalia, *Myrdal's Assumption on Race Relations: A Conceptual Commentary*, 40 SOCIAL FORCES 223 (1962).

³ New housing starts have vacillated: "Construction was begun on 84,000 housing units in January 1962, as compared with 87,400 in December of 1961 and 72,500 in January 1961..." U.S. DEPT OF COMMERCE, BUREAU OF CENSUS, *CONSTRUCTION REPORTS, HOUSING STARTS*, C20-32, Feb. 1962. The problem is clarified when 1960 data are compared to the above. "Work was started on 97,300 housing units in November 1960... in comparison with 112,000 units started in October, and the 106,500 units in November 1959." U.S. DEPT OF COMMERCE, BUREAU OF CENSUS, *CONSTRUCTION REPORTS, HOUSING STARTS*, C20-18, Dec. 1960.

⁴ Estimates vary, but in the next four decades the United States should have a total population of 320 million, eighty-five per cent being urbanites. See PICKARD, *METROPOLITANIZATION OF THE UNITED STATES* 8 (1959).

particularly, has been intensified.⁵ "Segregation barriers in most cities were tighter in 1950 than ten years earlier."⁶ Much of the housing market is closed to minorities for reasons apart from their personal worth or ability to pay. Usually, new housing is available only for whites, and, in that part of the market available to them, minorities, especially Negroes, must pay more for housing than the favored majority. But Negroes do not find themselves in the relatively permanent and well-paid jobs. The median income for Negro families in 1959 was \$2,917 or only 52% of that enjoyed by white families.⁷ "The dollar in a dark hand" does not "have the same purchasing power as a dollar in a white hand," and the dark hand holds fewer dollars.⁸

As a consequence there is an ever-increasing concentration on non-whites in racial ghettos, largely in the decaying centers of our cities—while a "white noose" of new suburban housing grows up around them. This racial pattern intensifies the critical problems of our cities: slums whose growth is abetted by the racial ghetto; loss of tax revenue and community leadership through flight to the suburbs of those financially (and racially) able to leave—all this in the face of growing city needs for transportation, welfare, and municipal services.⁹

Beyond a steady increase in the scope and degree of housing discrimination,¹⁰ there are secondary complications. Residential segrega-

⁵ See McENTIRE, *RESIDENCE & RACE* 68-71 (1960). Almost every study of housing conditions corroborates this point as to Puerto Ricans, Mexican-Americans, Orientals, Indians, Jews, and, especially, Negroes. In 1959, the Commission found that "housing ... seems to be the one commodity in the American market that is not freely available on equal terms to everyone who can afford to pay." U.S. COMM'N ON CIVIL RIGHTS REP. 534 (1959). In 1961, the Commission commented on its earlier statement saying: "Today, two years later, the situation is not noticeably better." It then quoted Commissioner Hesburgh: "I think this is the condition that we face...the central city throughout the United States in all of our large metropolitan areas is a rundown, dismal, most depressed and antiquated part of our city...completely backward in all its facilities, and these include the homes, the schools, the recreational facilities.... It is not just a question of houses and bricks and mortar and businesses and loans and all the rest. It is a problem of people, and unless we can find some answers to this problem on all levels, we are in real trouble as a Nation...." Report, U.S. COMM'N ON CIVIL RIGHTS REP. 1, 2 (1961).

⁶ U.S. COMM'N ON RACE AND HOUSING, *WHERE SHALL WE LIVE?* 3 (1958). "The expanded power of private builders and the use of their power in the manner described go far to explain the paradox of increasing residential segregation during a period of generally weakening racial prejudice and discrimination." *Id.* at 27. This is a critically important fact, for we are rapidly becoming a nation of urban dwellers, and the problems take on a new hue. See Wirth, *Urbanism as a Way of Life* in HART & REISS, *CITIES AND SOCIETY* 46 (1957). See also Fordham, *Decision-Making in Expanding American Urban Life*, 21 OHIO ST. L.J. 274 (1960).

⁷ BUREAU OF CENSUS, U.S. DEPT OF COMMERCE, *CURRENT POPULATION REPORTS—CONSUMER INCOME*, Ser. P-60, No. 35, p. 23, Table 2 (Jan. 5, 1961).

⁸ Castan, *A Negro Takes Over Federal Housing*, *Look*, Apr. 11, 1961, p. 36. "[S]egregated groups receive less housing value for their dollars spent than do whites, by a wide margin." U.S. COMM'N ON RACE AND HOUSING REP. 36 (1958).

⁹ U.S. COMMISSION ON CIVIL RIGHTS REP. 1 (1961).

¹⁰ Grodzins, *Metropolitan Segregation*, *Scientific American*, Oct., 1957, pp. 33-41. "The United States Census Bureau has released data on the white and non-white

tion tends to promote educational segregation¹¹ and has placed obstacles in the path of fair employment laws which seek to open job opportunities.¹² At the same time, Negro migrations from the South have resulted in additional demands for non-segregated housing. In Seattle, for example, Negro population "has increased by 72% from 1950 to 1960."¹³ These trends, coupled with prejudice-born distaste of minorities,¹⁴ appear to have infiltrated the financial arrangements of housing¹⁵ because many financial institutions actively supervise the policies of those to whom they loan money.¹⁶

In addition, organized real estate brokers, with few dissents, have followed the mistaken principle that only a "homogeneous" neighborhood assures economic soundness.¹⁷ Their views find elaborate and systematic expression, contributing to the continued existence of racial ghettos. The program in Grosse Pointe, Michigan, is a deplorable, but not rare, example: There discrimination covered the full ambit of "race, color, religion, and national origin." It was practiced with mathematical exactitude. Two groups, the Grosse Pointe Brokers Association and the Grosse Pointe Property Owners Association established and maintained a rating system to winnow out "undesirable" purchasers. Here is how it worked:

population of twenty-five standard metropolitan areas, which gives the racial breakdown separately for the central city and the area outside the central city. U.S. Dept. of Commerce, Release, March 26, 1961. It shows a uniform pattern of higher concentration of non-whites in the city than in the surrounding area. For example, non-whites were 14.0 per cent of the population of New York City and 4.8 per cent in the surrounding area. The figures for Chicago were 22.9 and 2.9; for Cleveland, 28.6 and 0.7." Robinson, *supra* note 2, at 102 n.7.

¹¹ Maslow, *De Facto Public School Segregation*, 6 VILL. L. REV. 353 (1961); MYRDAL, AN AMERICAN DILEMMA 618 (1944).

¹² N.Y. COMM'N AGAINST DISCRIMINATION, IN SEARCH OF HOUSING: A STUDY OF EXPERIENCES OF NEGRO PROFESSIONAL AND TECHNICAL PERSONNEL IN NEW YORK STATE (1959).

¹³ FIFTY STATES REPORT FROM THE STATE ADVISORY COMMITTEES TO THE U.S. COMMISSION ON CIVIL RIGHTS 628 (1961).

¹⁴ See Friedrichs, *Christians and Residential Exclusion, an Empirical Study of a Northern Dilemma*, 15 J. OF SOCIAL ISSUES 14 (1959); Koenig & King, *Cognitive Simplicity and Prejudice*, 40 SOCIAL FORCES 220 (1962); ROKEACH, THE OPEN AND CLOSED MIND (1962).

¹⁵ McENTIRE, RESIDENTIAL & RACE 238-250 (1960). See *Burks v. Poppy Constr. Co.*, 20 Cal. Rptr. 609, 370 P.2d 313 (1962).

¹⁶ U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING, 27-108 (1961); McENTIRE, RESIDENCE & RACE 238-50 (1960); NATIONAL URBAN LEAGUE, MORTGAGE FINANCING FOR PROPERTIES AVAILABLE TO NEGRO OCCUPANCY (1954).

¹⁷ U.S. COMMISSION ON CIVIL RIGHTS REP., HOUSING, ch. 6A, p. 122 (1961); LAURENTI, PROPERTY VALUES AND RACE (1960). These sources hold that there is substantial evidence which indicates that presence of Negroes does not necessarily depreciate property values. It appears that fear is the real problem because fear of financial loss can become a self-fulfilling prophecy. Fear tends to produce panic-selling which in turn generates financial chaos and loss in the community which is the real thing feared. In a real sense then, it seems that, in this situation, the only thing to fear is fear itself.

A passing grade was 50 points. However, those of Polish descent had to score 55 points; southern Europeans, including those of Italian, Greek, Spanish or Lebanese origin had to score 65 points, and those of the Jewish faith had to score 85 points. Negroes and orientals were excluded entirely.¹⁸

The problems¹⁹ springing from housing segregation and racial prejudice are not foreign to the State of Washington.²⁰ At the present time, the number of substandard housing units is increasing at an alarming rate.²¹ "Data from the 1960 census show that 22.2 percent of the dwelling units of non-whites in Seattle, Spokane and Tacoma are substandard, dilapidated or lacking in plumbing facilities, compared to 8.8 percent for whites in these cities."²² Thus, the proportion of non-whites in substandard units is two and one-half times as great as the proportion of whites.²³ In addition, "*de facto* school segregation of Negroes will tend to *become more pronounced* in the years ahead, even if residential segregation were to remain constant instead of increasing as it has been doing between 1950 and 1960" (Emphasis added.)

The pattern of Seattle segregation, the rise of a ghetto, and the inchoate nature of a potentially explosive situation which could unleash unforetold social problems are made clear by a factual example:

¹⁸ U.S. COMM'N ON CIVIL RIGHTS REP., HOUSING 1, 3 (1961).

¹⁹ See Linder, *The Social Results of Segregation in Housing*, 18 LAW GUILD REV. 2 (1958). Note New York City's Fair Housing Law findings: "In the City of New York, . . . many persons have been compelled to live in circumscribed sections under substandard, unhealthful, unsanitary and crowded living conditions because of discrimination and segregation in housing. These conditions have caused increased mortality, morbidity, delinquency, risk of fire, inter-group tension, loss of tax revenues, and other evils. As a result, the peace, health, safety and general welfare of the entire city and all its inhabitants are threatened." NEW YORK, NEW YORK, ADMINISTRATIVE CODE § X41-1.0(a) (Supp. 1960-61).

²⁰ See *Report for State of Washington in FIFTY STATES REPORT FROM THE STATE ADVISORY COMMITTEES TO THE U.S. COMM'N ON CIVIL RIGHTS* 627-635 (1960). See also, *CASE STUDIES ON THE PROCESS OF INTEGRATION IN NEIGHBORHOODS OF SEATTLE, WASHINGTON, A REPORT BY THE RESEARCH COMMITTEE OF GREATER SEATTLE HOUSING COUNCIL*, March, 1960.

²¹ The Seattle Times, Monday, May 8, 1961, p. 4, Col. 1: "Units classified as 'dilapidated' have increased more than 1,000 since 1950 when 4,150 units were so listed. Of the units in the 'sound' classification, 14,715, nearly 8 per cent, lack one or more of the normal plumbing facilities, as do more than 5,000 or about one-fourth in the 'deteriorating' group. Thus some 25,000 units must be classed substandard, on the basis of today's commonly accepted definitions. This compares with 17,500 units dilapidated or with substandard plumbing as shown in the 1950 census. . . ."

²² See FIFTY STATES REPORT, *supra* note 20, at 627.

²³ *Ibid.*

²⁴ *Id.* at 629. "The proportions of non-white units that are substandard in Seattle, Spokane and Tacoma are 22%, 37% and 13% respectively; these figures indicate that the proportions of non-whites in substandard units are more than twice as great as for whites in Seattle, Tacoma and more than three times as great in Spokane. In Seattle, in addition to 22% of the non-white units being substandard, an additional 14% are deteriorating and in danger of becoming substandard." *Id.* at 627.

... in 1950, 44 percent of Seattle Negroes lived in 5 census tracts and 69 percent lived in 10 tracts. In 1960, 55 percent in 5 tracts and 78 percent lived in 10 tracts, all but one of which occupy a compact block in the central part of the city. Thus, the proportion of Negroes in 5 tracts *increased* from 44 percent to 55 percent and the proportion in 10 tracts increased from 69 percent to 78 percent. Despite the growth of the Negro population, the number of Negroes living in the 54 census tracts in the northern section of the city actually decreased. The implication of the facts is quite clear: there is a *pronounced and increasing concentration* of Negroes in a relatively small area in the central portion of the city.²⁵

The further implication is also quite clear. Unless the spread of racial discrimination is somehow retarded, it will continue to aggravate the already serious problems of our cities. In the context of due process prerequisites to state legislation, there is no doubt that, in Washington as well as nationally, racial discrimination in housing is a substantial social evil.

THE LEGAL CONTEXT

The fourteenth amendment to our federal constitution does, of course, prohibit racial discrimination,²⁶ but it applies only to that activity which the courts term official "state action."²⁷ It does not apply to discriminatory behavior of private persons.²⁸ To date, there has been no United States Supreme Court decision passing on the right of a citizen under the fourteenth amendment to be admitted without discrimination to publicly assisted or urban renewal housing.²⁹ This is

²⁵ *Id.* at 629. Slum areas deserve special attention because they harbor concentrations of delinquency, unemployment, blight, and substandard health conditions. Urban delinquency rates score 3 to 4 times those of rural areas and are densely concentrated within deteriorated neighborhoods. One four-year study showed that 75% to 90% of the boys living in or near the central business district of an American community were referred to courts. See LANDER, *TOWARD AN UNDERSTANDING OF JUVENILE DELINQUENCY* (1954). Another study showed 60% to 70% of the male youths between 16 to 21 to be both out of school and out of work. Of the high school graduates, only half were employed. These conditions are, of course, social dynamite. See REPORT OF DEP'T OF HEALTH, EDUCATION & WELFARE, *HEARINGS ON H.R. 7178, SPECIAL SUBCOMMITTEE ON EDUCATION, HOUSE COMMITTEE ON EDUCATION AND LABOR, 87th Cong., 1st Sess.* 5-15 (1961).

²⁶ U.S. CONST., amend. XIV, § 1.

²⁷ *Civil Rights Cases*, 109 U.S. 3 (1883). For a good discussion see Comment, *State Action, A Study of Requirements Under the Fourteenth Amendment*, 1 RACE RELATIONS REP. 613 (1956); St. Antoine, *Color Blindness But Not Myopia, A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 MICH. L. REV. 993 (1961).

²⁸ Consequently, racially restrictive covenants in a deed cannot be enforced by state courts, although they are not unconstitutional between the parties. See *Shelly v. Kramer*, 334 U.S. 1 (1948). Cf. *Barrows v. Jackson*, 346 U.S. 249 (1953); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 348 U.S. 380 (1954).

²⁹ The closest appellate case is *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950). This case dealt with a

one of the crucial areas. The result is that the fourteenth amendment has become primarily negative, a shield, pre-empting discriminatory state action. It has not proved itself to be a sword, a device through which Congress has passed positive legislation in the area of race relations. Instead, the states have tended to pass the legislation in this area.

Recognizing the deplorable conditions flowing from racial ghettos, seventeen states and many cities have sought to alleviate them³⁰ by enacting anti-discrimination housing measures. Basically, state enactments fall into one of three groups: those extending only to low-rent public housing projects and/or urban redevelopments; those extending to publicly assisted housing, including housing built with the aid of FHA-insured and VA-guaranteed loans; and those extending to non-governmentally assisted, *i.e.*, entirely private housing.³¹ The Washington statute falls into the middle class.³² It declares a state civil "right to be free from discrimination because of race, creed, color, or national origin," which includes, "the right to secure publicly-assisted housing without discrimination."³³ Under the statute, it is unlawful for "the owner of publicly-assisted housing to refuse to sell, rent, or lease to any person . . . because of the race, creed, color, or national origin of such person"³⁴ Is the "publicly-assisted" classification constitutional?

Before *O'Meara v. Board* and cases from other states which deal with the "publicly-assisted" category are analyzed, *Ming v. Horgan*³⁵ should be considered. This case was decided by a lower court before California passed its anti-discrimination housing measure. It held that "publicly-assisted" housing would require non-discriminatory selling even in the absence of a state statute requiring it. A Negro complainant brought a claim for damages against real estate dealers and developers who had

privately owned project of slum clearance erected under state law, using the state's power of condemnation, a partial tax advantage, and a transfer to the project of some city owned land.

³⁰ The enactments are collected in U.S. COMM'N ON CIVIL RIGHTS, HOUSING, app. VI, table 2, p. 200-01, supplementing pp. 411-412 of the 1959 Report (1961).

³¹ *Id.* at 121-31, and note, app. VI, table 1 for analysis of the statutes.

³² R.C.W. 49.60.030.

³³ *Id.* at subsection three. California's approach is similar. CAL. HEALTH & SAFETY CODE §§ 35700-35741. "The Attorney General of California has ruled, similar to Massachusetts and Connecticut, that a real estate broker's office is a place of public accommodation, and therefore, subject to the state public accommodation law." See U.S. COMM'N. ON CIVIL RIGHTS REP., HOUSING 189, n. 26 (1961).

³⁴ RCW 49.60.217. "Publicly-assisted housing" is defined as housing "financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions."

³⁵ 3 RACE REL. L. REP. 693 (Sacramento Co., Cal. Super. Ct. 1958).

built houses with VA and FHA insured financing and had refused to sell to him. The court held that the owner of private housing which was built with FHA mortgage insurance aid could not discriminate when deciding to whom he would sell. It reasoned that this decision was essential, otherwise "gone would be the principle of integration which seems to have become the law of the land as a necessary component of that equality of right required by the Constitution."³⁶

The constitutionality of anti-discrimination statutes when applied to "publicly-assisted" housing has been passed upon in two other cases. New York was the first state to decide the issue. A Negro citizen filed a charge with the New York State Commission Against Discrimination claiming that Pelham Hall Apartments had denied him an apartment because of his race.³⁷ At a public hearing, defendant did not deny the charge of discrimination, but attacked the constitutionality of the statute. The Commission concluded against defendant and issued a cease and desist order directing Pelham Hall Apartments to end its discriminatory practices. Later, the Commission found it necessary to bring a court action to enforce its order. Defendants renewed their constitutional attack, arguing that New York's statute violated the equal protection clause of the fourteenth amendment because its application was limited to the class of "publicly-assisted" housing, and that the statute deprived them of their property without due process of law.³⁸

Regarding the due process argument, the court concluded:

[I]t is firmly settled that private property rights are subject to the exercise of police power legislation Broad discretion resides in the legislature These particular legislative acts are directed against the practice of racial or religious discrimination, are presumed constitutional . . . and are to be stricken down by the courts only if it appears that they are clearly arbitrary, discriminatory and without reasonable basis. The legislation may be sustained as against an attack by an aggrieved property owner unless it appears that the enforcement thereof amounts to confiscation, that is, operates to preclude the use of his property for any purpose to which it is reasonably adapted I am satisfied that the legislature did act within the bounds of the police power in enacting [these] . . . provisions.³⁹

³⁶ *Id.* at 698. Defendants argued that they had "a perfect right to sell to whomever they chose; that they are at liberty to decline to sell to any person they choose [and] . . . that this is a fundamental right enjoyed by all citizens."

³⁷ *Matter of N.Y. State Comm'n Against Discrimination v. Pelham Hall Apartments*, 10 Misc. 2d 334, 170 N.Y.S.2d 750 (1958).

³⁸ 170 N.Y.S.2d at 756.

³⁹ *Id.* at 758-59.

In addition, the court held that the exclusive reference of the statute to "publicly-assisted" housing amounted to a reasonable classification under the "equal protection" clause. It said that, in view of state and national policy of dealing with civil rights legislation on a step-by-step basis, a classification scheme need only achieve the first step of an otherwise lawful purpose, *i.e.*, the elimination of discrimination. "[T]he test is whether or not the classification rests upon some reasonable basis bearing in mind the subject-matter and object of the legislation."⁴⁰

The legislature was authorized to proceed as it did in imposing a ban against discrimination in housing, that is, by gradual steps, beginning with provisions applicable to various classes of publicly owned and managed housing and over a period of time extending the provisions to specific classes of private housing projects inaugurated or carried out with governmental assistance. Proceeding in such manner required classification in the legislation enacted from time to time; and, under the circumstances, reasonable classification was justified.⁴¹

New Jersey's highest court also passed on the validity of "publicly-assisted" housing, unanimously sustaining it over all constitutional attack.⁴² Three Negroes tried to buy newly built homes in Levittown, New Jersey, and were refused. Levitt, the builder, sought an injunction to prohibit the administrative board from proceeding with its hearings on the grounds that it lacked jurisdiction and that the New Jersey law against discrimination was unconstitutional.

Citing the *Pelham Hall Apartments* case and others, the New Jersey Supreme Court concluded against plaintiffs on all counts. The court rejected the argument that by applying only to "publicly-assisted" housing the statute created an unreasonable and arbitrary classification which violated the fourteenth amendment. The court noted that the statute "may be viewed as a means chosen to ease the housing problem facing minority groups,"⁴³ so that "many more would be in a position to take an active and beneficial role in the cultural, social and economic life of the community"⁴⁴ With this thought in mind, the court said that ". . . these goals . . . do at least serve to demonstrate, insofar as they give a reasonable basis for the statutory classification, that the statute is not invalid on its face or palpably arbitrary."⁴⁵ Finally, the

⁴⁰ *Ibid.*

⁴¹ *Id.* at 760.

⁴² *Leavitt v. Division Against Discrimination*, 31 N.J. 514, 158 A.2d 177 (1960), *cert. denied*, 363 U.S. 418 (1960). See also *Levitt v. Division Against Discrimination*, 56 N.J. Super. 542, 153 A.2d 700 (1959).

⁴³ 158 A.2d at 187.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

court held that the New Jersey statute was not pre-empted by any conflicting federal statute.⁴⁶

Until *O'Meara v. Board*, the state cases which passed on the "publicly-assisted" category upheld the statutes over fourteenth amendment arguments to the contrary.

O'MEARA V. WASHINGTON STATE BOARD AGAINST DISCRIMINATION

The dispute in the *O'Meara* case began when Commander John O'Meara placed his house for sale by running a newspaper advertisement and posting a "For Sale" sign on his lawn. His house, purchased in 1955, was financed through a private loan insured by the Federal Housing Administration. Its advertised price was \$18,000. Seeking to deal directly with prospective purchasers, he did not list his house with a broker.

Mr. Robert L. Jones, a Negro, saw the newspaper advertisement and, after inspecting the house, tried to buy it at the advertised price. When the O'Mearas refused to sell to him because of his color, Jones filed a complaint with the Washington State Board Against Discrimination.

After an investigating officer found that no agreement could be made with the O'Mearas to eliminate the alleged unfair practice, the Board convened a hearing tribunal, which found as a fact that the O'Mearas had refused to sell their house to Jones because of his color and concluded that such refusal constituted an unfair practice as defined by RCW 49.60.217. Accordingly, the tribunal ordered the O'Mearas to cease and desist from that practice and further to accept the complainant's offer and tender of earnest money.⁴⁷

On appeal to the Superior Court from the Board's ruling, the court held Washington's anti-discrimination statute unconstitutional on several grounds in an opinion written by Judge Hodson.⁴⁸ The court noted that it was "fully cognizant of the evils which flow from discrimination because of race, creed or color in a free democratic society,"⁴⁹ and that the "practice of discrimination is utterly inconsistent with the political philosophy upon which our institutions are based."⁵⁰ One would think that considerations so fundamentally imbedded in our

⁴⁶ *Id.* at 188.

⁴⁷ The statement of facts is adapted from the Petition for Certiorari, pp. 6-8, *O'Meara v. Washington State Board Against Discrimination*, petition for cert. filed.

⁴⁸ *O'Meara v. Washington State Board Against Discrimination*, No. 535996 (Super. Ct., King Co., Wash., July 31, 1959).

⁴⁹ *Id.* at 3.

⁵⁰ *Ibid.*

legal fabric could lead only to upholding the statute. But Judge Hodson saw these basic matters clashing with "the right of the owner of private property to complete freedom of choice in selecting those with whom he will deal."⁵¹ After reviewing the *Pelham Hall*, *Levittown* and *Ming v. Horgan* decisions, he chose to sustain the right of the property owner, lest a decision to the contrary "seriously invade and curtail the right to freedom of contract."⁵²

An analysis of Judge Hodson's opinion follows.⁵³ He began by requiring that:

[T]he state here, in order to prevail, must demonstrate that the complainant, Jones, lies within the ambit of the equal protection clause of the 14th Amendment to the United States Constitution, which is "an explicit safeguard of prohibited unfairness" In order to be constitutional, the act in question must satisfy the notion of "state action."⁵⁴

Judge Hodson proceeded on a hitherto unknown principle of constitutional law: that before a state statute could be constitutional under the fourteenth amendment it must fall within the ground usually covered by the term "state action." By the traditional view, this requirement is met whenever a statute is enacted by a state legislature.⁵⁵ Read in this light, the "state action" requirement for state statutes is redundant. But Judge Hodson did not mean that "state action" was to be taken in its usual sense, *i.e.*, the formal and official actions of state government. Instead, his view is that the term should refer to the subject matter. He would require that before a state statute could be upheld it must apply to that subject-matter area of "state action" usually covered by the fourteenth amendment. Under this view, both Congressional power, under the fourteenth amendment, and the state police power would be constitutionally restricted to a coterminous area, excluding that of "private action."

This reasoning is, of course, in error. For example, Congress does

⁵¹ *Id.* at 4.

⁵² *Ibid.* For discussion of complementary approaches under the "due process" clause, see, Paulsen, *The Persistence of Substantive Due Process In The States*, 34 MINN. L. REV. 92 (1950).

⁵³ The authors are indebted, in part, to the analysis of Saks & Rabkin, *Racial and Religious Discrimination in Housing*, 45 IOWA L. REV. 488 (1960), and Van Alstyne, *The O'Meara Case and Constitutional Requirements of State Anti-Discrimination Housing Laws* (To be published).

⁵⁴ *O'Meara v. Washington State Board Against Discrimination*, No. 535996 (Super. Ct. King Co., Wash., July 31, 1959), p. 6. One might question why a burden is put on the state before it could "prevail" when Plaintiff O'Meara was the party attacking the statute's constitutionality. See discussion at notes 92 and 102 *infra*.

⁵⁵ For a cogent analysis see Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Peters, *Civil Rights and State Non-Action*, 34 NOTRE DAME LAW. 303 (1959).

not have authority to pass a comprehensive zoning act covering private property in the State of Washington, but the Washington legislature does. The state police power is certainly not coterminous with the power of Congress under the fourteenth amendment. It has been held that Congress has no power under that amendment to prohibit private discrimination in employment, public accommodations, etc;⁵⁶ but, on the other hand, the United States Supreme Court has held that the states quite properly may exercise their police power in such areas.⁵⁷ The basic error lies in viewing the "state action" requirement of the fourteenth amendment as a positive test of state statutes which ban racial discrimination. The opposite is the case. It is a negative test, a shield, which requires state statutes and other forms of "state action" to be struck down when based on race to promote racial discrimination. State statutes promoting civil rights for all citizens need meet only the test that they come within the ambit of the state police power. Exercises of state police power must be reasonably related to public welfare, but they are not restricted to that subject matter traditionally labelled "state action" under the fourteenth amendment. On review, the state supreme court chose to ignore this phase of the lower court opinion.

Judge Hodson advanced two additional grounds. The "publicly-assisted" classification was held invalid, in that it "not only violates the equal-protection clause of the 14th Amendment to the United States Constitution, but violates the special privileges and immunities clause of Article I, Section 12, of the Washington State Constitution," because it arbitrarily subjects sellers of "publicly-assisted" housing to a legal duty not imposed on non-publicly assisted sellers.⁵⁸ This amounted to an unreasonable classification for Judge Hodson.

His position here is inconsistent with the earlier part of his opinion and with the "step-by-step approach" to racial problems. He earlier held that the state police power was constitutionally confined, along with Congressional power, to the coterminous area of state action, *i.e.*, excluding private action. It is hard to conceive how Judge Hodson could believe that any state statute might possibly be passed which

⁵⁶ *Civil Rights Cases*, 109 U.S. 3 (1883). See *Collins v. Hardyman*, 341 U.S. 651 (1951); *United States v. Cruikshank*, 92 U.S. 542 (1875); and *United States v. Harris*, 106 U.S. 629 (1882).

⁵⁷ *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948); *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1944); see *Robison Housing*, 13 W. RES. L. REV. 101 (1961); Note, 107 U. PA. L. REV. 515, 525-533 (1959).

⁵⁸ *O'Meara v. Washington State Board Against Discrimination*, No. 535996, (Super. Ct. King Co., Wash., July 31, 1959) p. 8.

would impose an equal duty on non-publicly assisted, *i.e.*, private housing. On his own premises, state power could not reach so far. Since Judge Hodson's opinion conflicted with decisions in *Pelham Hall Apartments*, *Levittown* and *Ming v. Horgan*, it drew considerable comment. The critics were unanimous in severely questioning the analysis used.⁵⁹ In their book, *A Century of Civil Rights*, authors Konvitz and Leskes said:

We have deliberately omitted any discussion of *O'Meara v. Washington State Board Against Discrimination* . . . because Judge Hodson's decision in that case, holding the Washington housing law unconstitutional, is predicated upon an unsound theory and should be reversed on appeal.⁶⁰

Astonishment was widespread when, by a vote of 5-to-4, the state supreme court upheld Judge Hodson.⁶¹ There were two opinions for the majority. Three members of the court⁶² approved the lower court opinion on the equal protection point,⁶³ saying that "the reasons stated by Judge Hodson are adopted as the opinion of this court."⁶⁴ Quoting fifteen paragraphs from Judge Hodson's work, a total of almost three-fourths of their opinion, they held only that the "publicly-assisted" classification violates the reasonable classification requirement of the privileges and immunities clause of Article I, Section 12, of the state constitution. But they also quoted the lower court's holding which referred to the fourteenth amendment as well. Basically, they reasoned that:

There is no reason to suppose that persons with FHA mortgages on their homes are more likely to discriminate against minority groups than those who have conventional mortgages or no mortgages, or those who are purchasing upon contract.⁶⁵

This opinion rests upon one case—not a state case, but rather a United States Supreme Court decision under the 14th amendment.

⁵⁹ Robison, *Housing*, 13 W. RES. L. REV. 101, 121-23 n. 102 (1961); McGhee & Ginger, *The House I Live In*, 46 CORNELL L.Q. 194, 235-36 (1961); Forster & Rabkin, *Constitutionality of Laws Against Discrimination in Publicly Assisted Housing*, 6 N.Y.L.F. 38, 48-57 (1960); Note, 74 HARV. L. REV. 526, 583 (1961); Note, 28 GEO. WASH. L. REV. 758, 772-74 (1960).

⁶⁰ KONVITZ & LESKES, *A CENTURY OF CIVIL RIGHTS* 248 n. 19 (1961).

⁶¹ *O'Meara v. Washington State Board Against Discrimination*, 58 Wn.2d 793, 365 P.2d 1 (1961).

⁶² Judges Foster, Donworth and Weaver. *Id.* at 797, 365 P.2d at 5.

⁶³ "... [T]he only question is: Can the state constitutionally compel a home owner to sell his home to one designated by a state administrative agency solely because such home owner has not paid a public loan or a loan guaranteed by a Federal or state agency while immunizing all other home owners from such coercive powers?" *Id.* at 798, 365 P.2d at 4.

⁶⁴ *Ibid.*

⁶⁵ *Id.* at 797, 365 P.2d at 5.

This procedure accords with tradition, for the Washington Supreme Court has long held that federal precedent is applicable because the "equal privileges and immunities provision of Article I, § 12, of the state constitution and the equal protection clause of the fourteenth amendment to the constitution of the United States are substantially identical."⁶⁶ Ironically, however, *Patsone v. Pennsylvania*⁶⁷ actually supports a view opposite to that approved by the Washington majority of three.

Patsone, an alien, was convicted for violating a Pennsylvania statute which prohibited aliens from owning or possessing shotguns.⁶⁸ The statute's purpose was to protect wild game. It made the killing of certain game by aliens unlawful, and to serve this end it prohibited alien ownership or possession of shotguns. Patsone argued that the statute violated the equal protection clause because it unreasonably applied only to one class, aliens, who could not be assumed more likely to destroy wild game than any other class of persons. The parallel to *O'Meara* is obvious. But the only problem, at least for this majority, is that the *Patsone* case upheld the classification made by the Pennsylvania statute! Mr. Justice Holmes said that:

A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class.⁶⁹

But, more importantly, Holmes continued: "It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named."⁷⁰

Instead of invalidating the Washington anti-discrimination statute, *Patsone* is a precedent, more than sufficient, to sustain it. Generally speaking, the United States Supreme Court has followed *Patsone's* teaching,⁷¹ holding that: "It is no requirement of equal protection

⁶⁶ *Texas Co. v. Cohn*, 8 Wn.2d 360, 374, 112 P.2d 522 (1941). See *State v. Hart*, 125 Wash. 520, 217 Pac. 45 (1923); *Allen v. Bellingham*, 95 Wash. 12, 163 Pac. 18 (1917); *State v. Pitney*, 79 Wash. 608, 140 Pac. 918 (1914); *State v. Vance*, 29 Wash. 435, 70 Pac. 34 (1902).

⁶⁷ 232 U.S. 138 (1914).

⁶⁸ *Id.* at 143.

⁶⁹ *Id.* at 144.

⁷⁰ *Ibid.*

⁷¹ See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Railway Express Agency v. New York*, 336 U.S. 106 (1949); *Goesaert v. Cleary*, 335 U.S. 464 (1948). In the last case cited, the Court said that "a statute is not invalid under the Constitution because it might have gone farther than it did . . ." *Id.* at 467.

that all evils of the same genus be eradicated or none at all."⁷² In summary, this opinion, for three of the judges, misinterpreted its only cited precedent to deny the Washington legislature a classification scheme which, like New York and New Jersey, could involve a "step-by-step progress" in solving a thorny problem of race relations. Ultimately, this opinion rests on an independent state ground, Article I, Section 12, of the Washington constitution. Supposedly, it is interpreted in a manner which parallels the fourteenth amendment's equal protection clause. In fact, the interpretation in *O'Meara* was contrary and denied the judicial statesmanship already practiced by the United States Supreme Court under a supposedly identical clause when it ordered public school desegregation "with all deliberate speed."⁷³ A step-by-step approach to racial problems appears to be clearly constitutional.

Without mentioning the classification issue, Judge Mallery,⁷⁴ the writer of the second majority opinion, discovered four additional violations of the state constitution.⁷⁵ First, he said that enforcement of a board order, compelling sale to a designated person, constituted the taking of private property for private use.⁷⁶ However, the Board order, in fact, only regulates the disposition of property voluntarily sought to be relinquished, instead of appropriating to the public use property sought to be kept.⁷⁷ Consequently, the kind of interference involved in *O'Meara* is an exercise of the police power, not the power of eminent domain⁷⁸—the "taking" clauses govern only the latter.⁷⁹

⁷² *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949). "The fact that New York City sees fit to eliminate from traffic this kind of distraction [advertising on delivery trucks other than that relating to the owner's business] but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial." *Ibid.*

⁷³ *Brown v. Board of Education*, 349 U.S. 294, 301 (1955).

⁷⁴ One other judge, Ott, concurred in this opinion.

⁷⁵ But the entire opinion cited no cases, except a dissenting opinion by the author.

⁷⁶ "Private property shall not be taken for private use . . ." WASH. CONST. art. I, § 16, (amend. 9).

⁷⁷ An order follows a finding of discriminatory refusal to sell to the complainant. RCW 49.60.217(1) and RCW 49.60.250. This presupposes a decision to sell to someone.

⁷⁸ *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 348 P.2d 664 (1960). That case held that continual low flights over plaintiffs' lands amounted to the taking of an air easement, for which they were entitled to compensation under amendment nine. In dissent, Judge Mallery contended that this interference did not amount to a taking. Activity depriving the owner of the effective use of land he wants to live on seems to constitute a taking more than does deprivation of his power to discriminate when he sells the land.

⁷⁹ WASH. CONST. art. I, § 16 (amend. 9). Assuming, however, that an order to sell amounts to a taking, *Hogue v. Port of Seattle*, 54 Wn.2d 799, 341 P.2d 171 (1959), would probably render the order unconstitutional as a taking for private use (by the complainant), even though it occurred incidentally to the accomplishment of a valid

Second, Judge Mallery found that the statute attempted to confer original jurisdiction on the Board in certain cases over the title or possession of real property. The relevant constitutional provision⁸⁰ vests that jurisdiction exclusively in the superior courts, but indicates that a case involves title or possession only when the decision would determine the location of title or right to possession.⁸¹ Clearly, an order by the Board that O'Meara sell to complainant would not enable Jones to succeed in an action of ejectment.

The third defect asserted would invalidate the entire Law Against Discrimination⁸² as a violation of state due process.⁸³ The principles of an independent judiciary and the separation of powers⁸⁴ are claimed to prohibit the combination of functions conferred on the Board, especially the functions of prosecution and adjudication.⁸⁵ Besides lacking procedural safeguards, the machinery of the Board was said unconstitutionally to favor complainants, since filing a complaint is free, while resisting the Board is difficult and expensive. Whatever their merits, *stare decisis* has long opposed these conclusions. The Washington Law Against Discrimination copies the enforcement provisions of the National Labor Relations Act,⁸⁶ including the combination of functions and the inherent bias. The Supreme Courts of the

public object (elimination of discrimination and provision of adequate housing for minorities). In the *Hogue* situation, a statute authorized the condemnation of agricultural and residential lands for a "higher or better economic use," *viz.*, private industrial sites. *Id.* at 193. The court, however, protected "the rights of private property against the inroads of public bodies who seek to acquire it for private purposes which they honestly believe to be essential for the public good." *Ibid.* The court should perhaps have spoken of public use, since the public purpose doctrine usually pertains to the expenditure of taxes. McDougal & Mueller, *Public Purpose in Public Housing*, 52 YALE L.J. 42 (1942). Although these authors argue that the public use and public purpose doctrines should yield the same results, the expenditures of tax money to develop the industrial sites involved in the *Hogue* case would probably have been held constitutional. See *State ex rel. State Reclamation Board v. Clausen*, 110 Wash. 525, 188 Pac. 538 (1920). *But cf.* *Berman v. Parker*, 348 U.S. 26 (1954), where the public purpose argument was used to sustain the taking of land for private redevelopment.

⁸⁰The superior court shall have original jurisdiction... in all cases at law which involve the title or possession of real property, or the legality of any tax... or municipal fine..." WASH. CONST. art. IV, § 6 (amend. 28).

⁸¹See *Pursley v. Pursley*, 213 S.W.2d 291 (Mo. App. 1948). If "involve" meant more than the text suggests, justice courts would probably lack jurisdiction of actions to recover rent and municipal courts of actions to impose fines (since the verb has the same construction for both direct objects).

⁸²RCW 49.60.010-.320.

⁸³WASH. CONST. art. I, § 3. The opinion does not refer to the federal constitution.

⁸⁴Presumably the separate enumeration of the powers of each department imply these principles. See WASH. CONST. art. II, § 1; art. III, § 1; art. IV, § 1.

⁸⁵The functions of the Board include making rules and policies and investigating and passing on complaints (RCW 49.60.120), conducting hearings and adjudicating complaints (RCW 49.60.2050), and defending appeals of its orders (RCW 49.60.270).

⁸⁶29 U.S.C. §§ 152-168 (1959). The relevant enforcement procedures are contained in 29 U.S.C. § 160 (a)-(f) (1959).

United States, in 1937,⁸⁷ and of Washington, in 1940,⁸⁸ have held that this administrative structure amply conforms with due process requirements.

Fourth, Judge Mallery found the Board order in conflict with the constitutional requirement that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law."⁸⁹ The Washington court, however, has interpreted this section as identical in purpose and substance with the fourth amendment to the federal constitution,⁹⁰ and the *O'Meara* case involves no issue of search or seizure.

A vigorous opinion by Judge Rosellini registered the dissent of four judges.⁹¹ They reasoned that, inhering in sovereignty, the police power of the legislature extends as far as the requirements of the public welfare, except as limited by constitution. A legislative enactment thus carries a presumption of validity⁹² that nothing can overcome but a direct constitutional mandate or the absence of any tendency reasonably to correct some evil or promote some interest of the state.⁹³ The presumption sustains a legislative classification unless it is manifestly arbitrary. While the *O'Meara* decision was pending, the court in *Clark v. Dwyer*⁹⁴ upheld, on this reasoning,⁹⁵ a legislative distinction between grading standards for red and yellow apples, when it found that the legislature may reasonably have believed the distinction to be warranted.

The dissent offered several grounds, any one of which the legislature

⁸⁷ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the NLRA).

⁸⁸ *State v. Sears*, 4 Wn.2d 200, 103 P.2d 337 (1940) (upholding the analogous Washington Unfair Practices Act).

⁸⁹ WASH. CONST. art I, § 7. —

⁹⁰ *State v. Miles*, 29 Wn.2d 921, 190 P.2d 740 (1948).

⁹¹ Concurring in dissent were Judges Hill, Hunter, Rosellini, and Chief Justice Finley.

⁹² The presumption arises from deference to the sovereignty of the people, WASH. CONST. art. I, § 1, whom this opinion regards as speaking through the legislature, and from judicial reluctance to substitute the judgment of the court for that of the legislature in policy decisions. See HAND, *THE BILL OF RIGHTS* 39-46 (1958).

⁹³ The trial court found as a fact the social evil of housing discrimination. Judge Foster quoted this finding. Judge Rosellini stated that the fact would be judicially noticed in any event and that the statute tended to correct the evil. "A crack appears in the walls of the ghetto, and the educational process which, we hope, will someday eliminate the evil of discrimination, begins." *O'Meara v. Washington State Board Against Discrimination*, 58 Wn.2d 793, 808, 365 P.2d 1, 9 (1961).

⁹⁴ 56 Wn.2d 425, 353 P.2d 941 (1960). *Accord*, *State v. Dexter*, 32 Wn.2d 551, 202 P.2d 906, *aff'd*, 338 U.S. 863 (1949).

⁹⁵ In *Clark v. Dwyer*, 56 Wn.2d 425, 353 P.2d 941 (1960), the decision of the lower court was rendered on July 27, 1959, and that of the supreme court on June 30, 1960. The corresponding dates in the *O'Meara* case were October 14, 1959, and September 29, 1961. Therefore, the supreme court had both cases under consideration at the same time.

may have used to single out publicly-assisted housing: (1) In eliminating a widespread evil, the legislature may proceed step by step.⁹⁶ (2) Discrimination is a greater evil when practiced in a program for which its victims help to pay.⁹⁷ (3) The problem of inadequate housing for minorities might be largely solved through legislation affecting the kind of housing which is most often new and most easily financed.⁹⁸ (4) The prior involvement of an agency in transactions affecting publicly-assisted housing make enforcement easier.⁹⁹ (5) Other legislatures have regarded the distinction as reasonable.¹⁰⁰ Unless every one of these grounds may fairly be said to strain the credulity of the court,¹⁰¹ the normal reasoning requires that the presumption of constitutionality sustain the classification.¹⁰² The other cases in point, of course, support the dissent.

⁹⁶ *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). There a regulatory statute applied to sellers of custom-made, but not of ready-to-wear, eyeglasses. "Reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Id.* at 489. Possible local differences in the problems of regulating the two groups were held to warrant the piecemeal approach. Need for administrative experiment generally justifies such an approach. Tussman & Ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

⁹⁷ See Foster & Rabkin, *The Constitutionality of Laws Against Discrimination in Publicly-Assisted Housing*, 6 N.Y.L.F. 38 (1960) (quoted by Judge Rosellini).

⁹⁸ Because of their relatively low incomes, most members of minority groups are unlikely to buy other than publicly-assisted housing. Moreover, the relative newness of assisted housing suggests that the actual coverage of the prohibition will increase with time and that the prohibition is less likely to cause enforcement problems through disturbance of existing housing patterns.

⁹⁹ People are more willing to accept government regulation when it accompanies a benefit than when it impinges on a hitherto private concern. Also, delay or suspension of public insurance is a possible enforcement device. See Foster & Rabkin, *supra* note 97.

¹⁰⁰ This, however, is a make-weight reason. Besides, only New York had such a statute in effect in 1957 when the Washington legislature acted.

¹⁰¹ If, for example, there were no grounds upon which to urge the classification except that FHA-insured owners discriminate more than others or that this class includes so many that the classification makes no difference, then the statute would be justly condemned. Note, 107 U. PA. L. REV. 515 (1959). Cf. *Morey v. Doud*, 354 U.S. 457 (1957); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

¹⁰² Although they are not relevant to the *O'Meara* case, as will appear, certain qualifications attach to the presumption of constitutionality, since the equal protection clause proscribes some classifications which legislatures might reasonably make. When hostile motives probably account for a classification based on a trait of suspect rationality, the classification ordinarily cannot stand, especially if it is underinclusive. See *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (alienage); *Oyama v. California*, 332 U.S. 633 (1958) (ancestry); *Edwards v. California*, 314 U.S. 160, 181, (1941) (concurring opinion) (indigence); *Truax v. Raich*, 239 U.S. 33 (1915) (alienage); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (race). The more recent cases have applied a stricter standard where suspect traits are involved. Compare *Takahashi v. Fish & Game Comm'n*, *supra*, and *Oyama v. California*, *supra*, with *Terrace v. Thompson*, 263 U.S. 197 (1923) and *Patson v. Pennsylvania*, 232 U.S. 138 (1914). But invidious motives not related to race are readily overlooked. See *Goesaert v. Cleary*, 335 U.S. 464 (1948) (sex of bartenders); *Kotch v. Pilot Comm'rs*, 330 U.S. 552 (1947) (family relationship among pilots). And wartime emergency justifies extreme racial discrimination. *Korematsu v. United States*, 323 U.S. 214 (1944). Obviously these qualifications do not affect the *O'Meara* case because classification

Since the Washington statute is unconstitutional, it appears that rapid intensification of racial problems will continue apace. The legislature could enact a statute covering all housing, public and private, and thereby avoid the classification issue of *O'Meara*.¹⁰³ Most courts would sustain this kind of statute as conformable with due process. So long as the affected transactions partake of a predominantly commercial character, they are subject to regulation under the police power,¹⁰⁴ even if economic injury would result.¹⁰⁵ Similarly, an anti-discrimination

based on source of home financing concerns no suspect trait or invidious motive. Another qualification placed on the presumption is its relaxation where civil liberties instead of economic or administrative technicalities are involved. Compare *Brown v. Board of Educ.*, 347 U.S. 483 (1954) and *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (sterilization), with *Tigner v. Texas*, 310 U.S. 141 (1940) (scope of antitrust laws) and *Bell's Gap R.R. v. Pennsylvania*, 134 U.S. 232 (1890) (taxation). In the former kind of case the court determines for itself whether the classification has merit. In this respect the *O'Meara* case differs somewhat from *Clark v. Dwyer*, 56 Wn.2d 425, 353 P.2d 941 (1960) (apple grading) and *State v. Dexter*, 32 Wn.2d 551, 202 P.2d 906, *aff'd*, 338 U.S. 863 (1949) (timber cutting). But the coverage of a statute against discrimination does not involve civil rights determinations, while it does involve decisions on administrative and enforcement problems that are typically within legislative competence. Even if the court in the *O'Meara* situation ought independently to weigh the evidence, the classification should stand because it has some merit. See notes 19-23 *supra*, and accompanying text. See generally Tussman & Ten Broek, *supra* note 96.

¹⁰³ Another easy way out, short of overruling *O'Meara*, is for the legislature to re-enact the same statute with one additional qualification. "Publicly-assisted" housing could be further defined as that housing which is listed or offered for sale through an agent—any agent, thereby excepting from statutory coverage the case where a home owner seeks to sell his own home. Since Commander O'Meara sought to sell his home independently of any agent, the State Supreme Court would be given the opportunity to restrict the *O'Meara* case solely to that situation and to uphold the new statute as applied to the newly defined classification of "publicly-assisted." Another approach, urged by one author, would proceed with a formal declaration of civil rights inherent in state citizenship. See Lehman, *Must I Sell My House to a Negro?* 42 CHICAGO BAR RECORD 283 (1961).

¹⁰⁴ Under the police power the state may regulate the use of private property. *Miller v. Schoene*, 276 U.S. 272 (1928) (destruction of diseased trees); *Block v. Hirsh*, 256 U.S. 135 (1921) (emergency rent control); *Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917) (prohibition of potential nuisance conditions); *Hauser v. Arness*, 44 Wn.2d 358, 267 P.2d 691 (1954) (zoning regulation); *State v. Dexter*, 32 Wn. 2d 551, 202 P.2d 906, *aff'd*, 338 U.S. 863 (1949) (regulation of timber cutting). The state may regulate the conduct of private business transactions. *E.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), *affirming*, 185 Wash. 591, 55 P.2d 1083 (1936) (minimum wage); *Nebbia v. New York*, 291 U.S. 502 (1934) (administrative price fixing). The right of a private trader to refuse to deal may be restricted. *Lorain Journal Co. v. United States*, 343 U.S. 143 (1951) (Sherman Act § 2); *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941) (FTC Act § 5); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927) (Sherman Act § 2); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1921) (FTC Act § 5). In particular, racial discrimination in commercial activities may be prohibited. *District of Columbia v. Thompson Co.*, 346 U.S. 100 (1953) (restaurants); *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948) (common carriers); *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945) (labor unions); *People v. King*, 110 N.Y. 418, 18 N.E. 245 (1888) (employment); *Browning v. Slenderella Systems*, 54 Wn.2d 440, 341 P.2d 859 (1959) (public accommodations) (by implication).

¹⁰⁵ Actually, an anti-discrimination statute would probably not produce economic harm. An owner wanting to sell cannot lose by having to sell to a Negro at the same price he asks of whites. Moreover, it is by no means certain that property values

statute invades no constitutionally protected personal right,¹⁰⁶ unless applied in a situation where the restriction on privacy or individual liberty so far outweighs its tendency to eliminate economic discrimination that the law has no reasonable relation to its object.¹⁰⁷ But in

decline when Negroes move into a neighborhood. ABRAMS, FORBIDDEN NEIGHBORS, Ch. XII (1955); COMMISSION ON RACE & HOUSING, WHERE SHALL I LIVE? 19-20 (1958). In the long-run, elimination of uneconomic restrictions on competition for housing should increase the value of property. Cf. Buchanan v. Warley, 245 U.S. 60 (1917). This case held unconstitutional an ordinance against Negro occupancy because it decreased what the white owner could get for his property.

¹⁰⁶ In reaching its decision, the Washington court wisely declined to rely on O'Meara's argument that the statute abridges freedom of association. So far as it receives constitutional protection, that right is basically political. It guards against the tyranny that might result if by harassment or suppression the government could stifle the organizational forms through which citizens manifest dissent. See generally ABERATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION 171-252 (1961); Note, 46 VA. L. REV. 730 (1960). That the right does not refer to merely social or business relationships appears from the cases in which it has been successfully invoked. Shelton v. Tucker, 364 U.S. 479 (1960) (teachers' membership); Bates v. Little Rock, 361 U.S. 516 (1960) (NAACP); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (political activities); Watkins v. United States, 354 U.S. 178 (1957) (Communist affiliations); Wieman v. Updegraff, 344 U.S. 183 (1952) (organizations on attorney general's list). See also De Jonge v. Oregon, 299 U.S. 353 (1937) (participation in Communist public meeting). Even when relevant, the right of association has limits. Associational freedom and privacy yield to a countervailing state interest of substantially greater magnitude. Communist Party of United States v. Subversive Activities Control Board, 367 U.S. 1 (1961); Barenblatt v. United States, 360 U.S. 109 (1959) (Communist affiliations); Uphaus v. Wyman, 360 U.S. 72 (1952) (political summer camp); New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1928) (the KKK); Whitney v. California, 274 U.S. 357 (1927) (Communist Party). If the right did apply in O'Meara's situation, the state interest would overcome the private. For example, the state interest in eliminating discrimination overrides a union's right to select its members freely. Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945). Even if freedom of association were relevant, it would only remove the presumption of validity and require a weighing of the conflicting values. It is true that in speaking for the Supreme Court Mr. Justice Rutledge asserted that due process protection of first amendment rights includes a presumption of invalidity. Thomas v. Collins, 323 U.S. 516 (1945). But a majority of the Court has not subscribed to this doctrine. Kovacs v. Cooper, 336 U.S. 77, 90 (1949) (Frankfurter, J., concurring). To shift the burden of proof whenever first amendment rights are in issue disposes of the problem too summarily. *Ibid.*; FREUND, UNDERSTANDING THE SUPREME COURT 27, 28 (1949); HAND, THE BILL OF RIGHTS 57-66 (1958); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 25 (1959). The Washington court announced the "preferred position" doctrine in Adams v. Hinkle, 51 Wn.2d 763, 322 P.2d 844 (1958), but evidently did not follow it in Nostrand v. Balmer, 53 Wn.2d 460, 335 P.2d 10 (1959).

¹⁰⁷ Suppose that the legislature attempted to ban discrimination at dinner parties in private homes. This would seem to contravene the due process requirement that an exercise of the police power must reasonably tend to correct some evil of the state, e.g., *Nebbia v. New York*, 291 U.S. 502 (1934); *Clark v. Dwyer*, 56 Wn.2d 425, 353 P.2d 941 (1960), since the restriction of individual liberty entailed far outweighs any public evil. See *Meyer v. Nebraska*, 262 U.S. 390 (1923). *Accord*, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The Court in the *Meyer* case held that the liberty of parents in directing the upbringing of their children so outweighs the state interest in promoting a homogeneous national culture as to invalidate a law prohibiting the teaching of modern foreign languages. (The statute was directed against German language schools.) The *Pierce* case involved the right of parents to send their children to private schools. Like these cases, the hypothetical in the text illustrates a contradiction between the social or cultural interests of the individual and the state. Similarly a court could readily find such a statute to invade that privacy of the home which the fourth amendment was intended to secure. This is the argument Judge Mallory used. See text

light of the *O'Meara* case, it is hard to predict how the Washington court would treat such a statute.

A word might be said about alternative statutory considerations for the legislature. The approach of New York has the advantages of prospective effect and exclusively commercial coverage.¹⁰⁸ The Oregon statute avoids the privacy issue altogether by directing its prohibition to people engaged in the business of selling or renting.¹⁰⁹ It also provides wider actual coverage and enables more uniform enforcement than a law affecting every transaction.¹¹⁰

Nationally, an executive order by the President could provide that subsequent FHA commitments and insurance agreements be made subject to the condition that no discriminatory practice occur in the disposition of affected housing.¹¹¹ However, the widespread effect

accompanying notes 89-90 *supra*. (But the *O'Meara* case concerned business rather than personal relationships.) The United States Supreme Court tends to confine the fourth amendment to technical searches and seizures. See *Frank v. Maryland*, 359 U.S. 360 (1959). Because of its broader language, the analogous Washington provision warrants extension. WASH. CONST. art. I, § 7. But so far it too has been restricted to searches and seizures. *State v. Miles*, 29 Wn. 2d 921, 190 P.2d 740 (1948). The hypothetical case has a personal nexus and the *O'Meara* case an economic one. In between lies the situation of a family that takes a single boarder. The validity of a statute applied in these circumstances depends on whether the presence of a strong personal interest prevents the regulation of a concomitant economic interest. RCW 49.60.217 would have applied in this last situation. See RCW 49.60.040. Were RCW 49.60.217 declared invalid as applied in the situation described, it would not be invalid altogether. "[T]he application of such provision to persons or circumstances other than those to which it is held invalid shall not be affected thereby." RCW 49.60.010 (reviser's note). Courts recognize this kind of severability. *Local 103, United Brotherhood of Carpenters v. McAdory*, 325 U.S. 450 (1945).

¹⁰⁸ N.Y. CIVIL RIGHTS LAW § 18a-c (1958 Supp.).

¹⁰⁹ ORE. REV. STAT. 659.033 (1959).

¹¹⁰ Brokers, who probably handle most sales, are much inclined to practice discrimination. GREENBURG, RACE RELATIONS & AMERICAN LAW 300, 301 (1959). The same seems true of apartment operators, who handle most rentals. A broker violating the Oregon statute subjects himself to discipline and even license revocation. ORE. REV. STAT. 696.300 (1959). A related administrative approach is to treat offices of real estate agents as places of public accommodation under RCW 46.60.030(2). On this ground the Washington State Board Against Discrimination has obtained a court order compelling the appearance before it of a real estate salesman. *Seattle Times*, April 13, 1962, p. 15, col. 8. RCW 49.60.040 defines a place of public accommodation to include a place kept for the sale of "services or personal property, or for the rendering of personal services." The specification of personal property seems to exclude real property sales, although a broker or agent who merely finds buyers for his clients may fairly be said to sell or render services so as to come within the statute. The case for the Board is far weaker, however, than was that of the Connecticut Commission on Civil Rights, which similarly interpreted CONN. GEN. STAT. § 2464c (1953 Supp.) (amended by Conn. Pub. Acts. 1959, No. 113, amended by Conn. Pub. Acts 1961, No. 472, § 2, as amended, CONN. GEN. STAT. ANN. § 53-35 (1961 Supp.)). FEDERAL HOUSING AND HOME FINANCE AGENCY, NON-DISCRIMINATION CLAUSES IN REGARD TO PUBLIC HOUSING, PRIVATE HOUSING AND URBAN REDEVELOPMENT UNDERTAKINGS 16 (1957). That statute applied to any establishment "which caters or offers its services...to the public," and specifically included publicly-assisted housing. The Commission's interpretation apparently received no court test before statutory amendment made it obsolete.

¹¹¹ An executive order must satisfy due process. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). Statutory authority satisfies this requirement. *Ibid.* Congressional

which such an order would produce constitutes not only its principal attraction as a measure to combat discrimination, but also a possibly insurmountable obstacle to the expediency of its issuance.¹¹²

Excepting its implications for Washington legislation, the *O'Meara* case has limited precedential value. Lacking a majority rationale¹¹³ and resting on inadequate scholarship, it is an unhappy anomaly in Washington law. Confronted with a similar problem and an argument predicated on the *O'Meara* decision, the California Supreme Court has intimated what will probably come to be the case's precedential fate: "We are aware that similar legislation was held invalid by the Supreme Court of Washington in a five-to-four decision . . . but we do not find that case persuasive authority" ¹¹⁴

specification of criteria for applicants for FHA insurance could imply an intent to exclude the use of other, irrelevant criteria. But just as Congress (and the President) are presumed to require that Government employment practices embody the procedural safeguards of the Bill of Rights, *Greene v. McElroy*, 360 U.S. 474 (1959) (right of confrontation), so Congress may be presumed at least to authorize the disbursement of federal benefits in accordance with the principle of equal treatment irrespective of race. That principle, after all, underlies three amendments to the federal constitution. There is much reason to regard it as a national policy. An important analogy is Exec. Order No. 10557, 19 FED. REG. 5655 (1954), which requires that federal government contracts contain a promise by the contractor not to discriminate in employment. See generally Pasley, *The Non-Discrimination Clause in Government Contracts*, 43 VA. L. REV. 837 (1957). The legality of this order is apparently not doubted. See GREENBERG, *RACE RELATIONS & AMERICAN LAW* 186-192 (1959). Cf. *State ex rel. Kaser v. Leonard*, 164 Ore. 401, 102 P.2d 197 (1940) (minimum wage order). Compare *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The ICC orders against discrimination have more explicit statutory authorization. See, e.g., *NAACP v. St. Louis-S.F. Ry.*, 297 I.C.C. 335 (1955); *Keys v. Carolina Coach Co.*, 64 M.C.C. 769 (1955).

¹¹² See, *Lukas, Integrated Housing*, *The Reporter*, Feb. 15, 1962, p. 30.

¹¹³ Of the two opinions in which the majority express their views, neither mentions any provision of the state constitution that the other mentions, and only the first mentions the federal constitution at all. The lack of an opinion subscribed to by a majority of the court limits the precedential significance of the case to the bare proposition that RCW 49.60.010(3) and RCW 49.60.217 violate the state constitution. Since a majority did not refer to the federal constitution, the court did not really decide a federal question. And the opinion which referred to the federal equal protection clause relied equally on the state privileges and immunities clause. Consequently, the United States Supreme Court denied a petition for certiorari because the state decision rested on an independent state ground.

While insulating their decisions from Supreme Court review, this practice of state courts creates serious problems of judicial administration. See Note, 74 HARV. L. REV. 1375 (1961).

¹¹⁴ *Burks v. Poppy Const. Co.*, 20 Cal. Rptr. 609, 370 P.2d 313, 320 (1962). The statute, which was upheld, read: "It shall be unlawful: 1. for the owner of any publicly assisted housing accommodation with knowledge of such assistance to refuse to sell, rent or lease or otherwise to deny to . . . any person or group of persons such housing accommodation because of race, color, religion, natural origin, or ancestry of such person or persons." On the same day, the California Supreme Court held that real estate brokers, when acting as such, came within another statute which disallowed "all business establishments" from denying "the full and equal accommodations, advantages, facilities, privileges or services" carried out by those business establishments. *Lee v. O'Hara*, 20 Cal. Rptr. 617, 370 P.2d 321 (1962). Additionally note, *Vargas v. Hampson*, 20 Cal. Rptr. 618, 370 P.2d 322 (1962) and *Hudson v. Nixon*, 20 Cal. Rptr. 620, 370 P.2d 324 (1962) which indicate that actions for damages and injunctions to redress such discrimination would be proper modes in certain circumstances.